

In the Matter of

TIMOTHY JARVIS,

Complainant

vs.

BATTELLE PACIFIC NW LABORATORY,

Respondent

6/2/97

CASE NO: 97-ERA-15

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Before: Thomas Schneider
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This matter arises under the Clean Air Act (CAA), 42 USC §7622, the Solid Waste Disposal Act (SWDA), 42 USC §6971, the Toxic Substances Control Act (TSCA), 15 USC §2622, the Clean Water Act (CWA), 42 USC §300j, and the Comprehensive Environmental Recovery Act (CERCLA), 42 USC §9610, (the environmental acts) and the Energy Reorganization Act (ERA), 42 USC §5851 and the regulations in 29 CFR Part 24. A hearing was held before me on March 6 and 7, 1997 in Richland, Washington. After trial both parties filed excellent, very helpful briefs.

Background

Complainant, Dr. Timothy T. Jarvis (Jarvis), was an environmental compliance inspector for the respondent employer, Battelle Pacific Northwest Laboratory (Battelle) from April 1991 to May 1992. TR 29.¹ In that position he conducted a number of environmental compliance inspections. In May 1992 he was transferred, at his request, to Battelle's Environmental Management Operations Division. When that division disbanded in early 1994, he transferred to his current division, the Environmental Technology Division.

Issues

In order to establish a prima facie case for relief under the Acts involved here, an employee must show: (1) That the party charged with discrimination is an employer subject to the Act; (2) that he engaged in protected conduct; (3) that he was subject to adverse employment action; (4) that his employer was aware of the protected conduct when it took the adverse action; and (5) that sufficient evidence exists to raise the inference that the protected conduct was the likely reason for the adverse action. If the protected activity played at least some role in the firing, the respondent has the burden of showing that the adverse action would have been taken even in the absence of the protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989); *Ertel v. Giroux Brothers Transportation, Inc.*, 88-STA-24 (Sec'y.Feb. 16, 1989) DOL Decs.² Vol. 3, No. 1, p. 162, 168; *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). In ERA cases the employer's evidence on this last point must be clear and convincing. 42 USC §5851(b)(3)(D), *Timmons v. Mattingly Testing Services*, 95-ERA-40 (Sec'y. June 21, 1996) slip opinion, p. 16.

There is no question that Battelle is an employer subject to ERA and at least some of the other Acts. There is also no question that Jarvis engaged in considerable protected activity while he was an environmental compliance inspector until May 1992. There is a dispute whether certain of his activities in 1995 were protected activities. The employment action Jarvis alleges was adverse was a one-week suspension without pay in April 1996. The key issues here are: whether the managers responsible for the suspension were aware of the protected activity, whether the protected activity was the likely reason for the suspension, and whether Jarvis would have been suspended even in the absence of the protected activity.

Protected activities

¹ TR refers to transcript; CX to complainant's exhibits; EX to employer's exhibits.

² DOL Decs. refers to the publication of the United States Department of Labor entitled "Decisions of the Office of Administrative Law Judges and Office of Administrative Appeals." Secretary of Labor Decisions are also available on a CD ROM published by the Office of Administrative Law Judges, entitled "Whistleblower Library" for sale by the U.S. Government Printing Office, Superintendent of Documents, and are also available at OALJ/DOL website at <http://www.oalj.dol.gov/library.htm>.

In the course of conducting audits and reporting violations of numerous environmental laws and regulations in 1991 and 1992 Jarvis was criticized by his supervisors for his style described, *inter al*, as intimidating and officious. TR 41, CX 10 at B85. Jarvis contends that these criticisms were prompted by the substance of his findings, dressed up as criticisms of his style. He felt the message was he should make the clients happy. TR 41. The clients were the people he audited.

One of Jarvis's audit reports concerned the violation of a DOE (Dept. of Energy) Order prohibiting retaining explosive materials, in this case lithium, in the same building as radioactive materials. TR 35-37. Although Dr. Billy Shipp was present at the "in-briefing" respecting that audit, (TR 121) this was prior to the audit report. Dr. Shipp also received a copy of the report (RX 15) but remembers neither the in-briefing nor receiving the copy. TR 362. Dr. Shipp was aware of the problem of the stored lithium. TR 367. Other audits called attention to other violations of environmental laws and regulations, to which, Jarvis felt, there was no appropriate response. CX 9, 10. On the contrary, he was criticized for needing "more effective interpersonal skills" (CX 3, p. B242), and for "carrying strong feelings about past events." CX 4, p. B237.

In April 1992 Jarvis appealed to Dr. William R. Wiley, the head of Battelle, (CX 15) who appointed a team to investigate the complaints. The team reported back on July 9, 1992. CX 9. (July 9, 1992): "The TEAM concludes that Lab Safety management has not intended to pressure Jarvis to be less than honest and factual in inspection reports. Nevertheless, there are legitimate questions about the effectiveness of communications concerning this question, and there is evidence that Jarvis is at least partially responsible for some of the communication breakdown which has occurred." CX 9, p. B64:

The violation found by Jarvis in March 1992 resulted in an explosion in August 1992. CX 8. On October 19, 1992 Wiley met with Jarvis and John Hirsch, Director of Personnel. Wiley said he appreciated Jarvis's raising the issues, and was sorry it was necessary to bring the matter to Wiley, and that Jarvis "didn't get the type of response that was appropriate from others." Wiley told Jarvis he would not be retaliated against in any way. CX 14. Jarvis has felt that Wiley and Hirsch protected him from retaliation since then and that retaliation began again after Wiley died and Hirsch was fired in February 1996.

Jarvis was no longer an environmental compliance officer after May 1992. He alleges no further protected activities and no further retaliation until 1995. The parties disagree on whether the following activity is a protected activity.

Participation in the RAC

In 1995 Jarvis was assigned to work on risk acceptance criteria (RAC) for the Department of Energy and the Defense Facilities Nuclear Safety Board (DFNSB). TR 200-201. The document he wrote advocated a new methodology in measuring harm to health and the environment from tank waste characterization and created a "firestorm of protest and repudiation." CX 1, CX 2, p. 2. He also participated in a phone conference with people from DOE, DFNSB, and others. His performance review stated that his conduct in that conference was undiplomatic and that he could have taken some measures to make the call less incendiary and potentially damaging to Battelle. CX

2, p. 2.

I conclude that Jarvis's work on the RAC was not protected activity. Jarvis admitted that the RAC document (CX 1) does not allege a violation of any of the environmental Act or the ERA. TR 130-131. Jarvis contends that the following italicized language in the ERA makes his RAC activity protected:

No employer may ... discriminate against any employee ... because the employee ...
(F) ... *participated* ... in any manner in such a proceeding ... or in *any other action*
to carry out the purposes of ... the Atomic Energy Act ... [42 USC §5851(a)(1)]

He argues that the Act is concerned with safety and because the RAC involved safety its preparation was participation in an "other action to carry out the purposes" of the Act. I believe the whistleblower protection sections of ERA do not cast so wide a net. All the legitimate, work related activities of every employee working on contracts involving atomic energy would be protected activities. Every letter written, every security guard's punching of a time clock would be a protected activity. In *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y. 1993) the Secretary of Labor held that for an activity to be a protected activity under the environmental acts the complainant had to have a "reasonable perception" that the employer was violating or was about to violate the acts. Slip op., p. 26. Simply annoying the employer or the employer's client is insufficient to surround an activity with the "protected" mantle.

The parties disagree whether the client's concern that Mary Jarvis, Jarvis's wife, participated in the same RAC project conference call in the Fall of 1995 played a role in the adverse action taken the following April. In my view her participation was not protected activity and it therefore makes no difference whether Battelle officials, Dr. Shipp in particular, considered this so-called conflict of interest issue.

Events of April 19 - 23, 1996

The heart of the dispute between the parties is whether Jarvis was suspended for his conduct on April 21 and 22, 1996, described below, or whether the suspension was a mere pretext for retaliation for his protected activities.

Mary Jarvis is also a Ph.D. and works for the Department of Energy in Richland, Washington, the entity that Battelle refers to as its client. On Friday, April 19, 1996, at approximately 4:00 p.m. she was talked to by her supervisor, Jon Peschong. There is a question whether he prevented her from leaving her office by barring the door, and the record does not disclose exactly what he said to her. In any event, she was very upset by the interview (CX 17) and first called her husband, Jarvis, thirty miles away to drive her home. Ultimately she drove home herself. On Sunday morning, April 21, Jarvis called Peschong at home and, all agree, called him a "jerk" several times. All agree further, that Jarvis informed Peschong that on Monday Jarvis would be in the "smurf" building, where Peschong and Mary Jarvis worked. Jarvis testified that he did not intend to threaten Peschong, and that Jarvis thought it would be advisable not to have Peschong talk to Mary further without the

presence of Peschong's supervisor. Peschong testified that he felt threatened. Peschong testified that he called Jim Spracklen of DOE Security, who advised him to stay away from Tim and Mary Jarvis and to call 911 or DOE Security if Tim Jarvis "came to me" on Monday. RX 13, entry for 4/21-1200.

On Monday morning Jarvis in fact had business in the "smurf" building, but Peschong saw Jarvis in Mary's office, where, presumably, he had no official business. Peschong called Spracklen, who told him to leave the area, and DOE's Human Resources office. RX 13, TR 316, 320. Dr. Shipp, Jarvis's Level I manager at Battelle, was contacted. (Level I is the top; there is a level II manager, Scott Heaberlin, and a Level III manager, Steve Gajewski, above Jarvis.) Shipp thought they had a "very real threat before them." TR 371. Shipp called Battelle human resources and security personnel, and Heaberlin and Gajewski. Gajewski paged Jarvis and told him to return to his office at Battelle. TR 373. Jarvis did so.

These events consumed significant amount of Battelle and DOE management time on Monday, April 21. TR 171-172, 371-373; see CX 20 (notes by Marilyn Merryman.) The following day, Tuesday, April 23, Dr. Shipp convened a Personnel Action Review Committee (PARC) to determine what discipline to impose on Jarvis. PARCs are held to consider serious personnel actions, and consist of the Level I, II, and III managers of the employee for whom a personnel action is under consideration, a Level I manager from another Battelle division, representatives of the human resources department, and legal counsel. The PARC agreed that Jarvis should be suspended for one week without pay. Jarvis was suspended for the week beginning April 29. CX 5. That is the adverse action which Jarvis contends is the discrimination here. He returned to work thereafter and continues to work at Battelle.

Although a one-week suspension does not seem like a very serious punishment, the suspension letter (CX 5) states that: "any further inappropriate actions could lead to further disciplinary action up to and including termination. Incidents that make it difficult for you to work effectively with sponsors directly affects your employability with Battelle." CX 5, p. B53. The letter also refers to "historical context" (at p. B52) which Jarvis contends refers to earlier SDRs (Summary, Review and Development, sometimes called performance evaluations), which criticized Jarvis's style, criticisms allegedly really aimed at his protected activities through May 1992.

The decision to suspend complainant

It is possible, even likely, that a conscientious and aggressive auditor who finds many safety violations in an operation may also be blunt and undiplomatic. The people audited may dislike both the substance and the style of the criticism. I find that this was most probably the case with Jarvis in 1991 and 1992. But he got out of the auditing business in May 1992. His supervisors changed after that. Steve Gajewski did not come to Battelle until early 1994. TR 258. Scott Heaberlin began working for Dr. Shipp approximately in 1994. TR 198. Even though it is possible that these supervisors read earlier SDRs with references to Jarvis's style, I find that their opinions of Jarvis and his style were more significantly influenced by their own perceptions, and the perceptions of people

they knew who dealt with Jarvis on their watch. To the extent they considered Jarvis's style blunt and undiplomatic and off-putting they did not consider his auditing activities but rather his style as it was manifested in his activities with which they were familiar.

During the PARC deliberations, the Level I manager from a different department was Ron Walters. He referred to an incident that seems to have had an impact on the PARC members. He reported that on a previous occasion, when Mary Jarvis still worked for Battelle, Mary was to have a meeting with her supervisor, Judy Mahaffey. Tim Jarvis showed up at that meeting and was asked to leave because it was a personnel matter. He left. Ms. Mahaffey thought Jarvis's attempt to attend that meeting was inappropriate. Ron Walters thought it was a similar incident to the April 21, 1996 incident, in that Jarvis attempted to insert himself into personnel actions involving his wife. Jarvis testified that his presence was due to a change in agenda for the meeting.

I find that, in the words of Marilyn Merryman, one of the members of the PARC and the Human Resources Manager of Jarvis's division, the "suspension was for a singular event that disrupted the workplace." TR 145, 187. Ms. Merryman was aware of the references to Jarvis's abrasive style (TR 182) but I find her testimony of the reason for the suspension entirely credible. Jarvis's level III and level II managers were relatively unfamiliar with his auditing activities of 1991 and 1992. Dr. Shipp did not remember Jarvis's role in the lithium storage incident. Ron Walters was influenced chiefly by the incident involving the meeting with Mary and Ms. Mahaffey. The only other attendees at the PARC meeting were Steve Porter, the lawyer, Pat Lamberson, an observer from Ms. Merryman's office, Rich Adams, the Director of Human Resources and April King, who took notes. CX 16. Dr. Shipp is reported to have said: "The fact is that Tim has a history of inappropriate intervention. That is what we need to take into account." CX 16. The reference to "intervention" shows this was a reference to the incident Ron Walters brought up, not to Jarvis's auditing history. The record does not show what Rich Adams contributed to the PARC, but he was in the middle of the incidents of April 19-22, 1996 (CX 17) and it is almost certain that these things were in his mind rather than historical accounts of an abrasive style. Several people testified that the history of Jarvis's style was brought up only to determine whether Jon Peschong's fear of Jarvis was well founded.

Even if Jarvis's involvement in the RAC proposal were deemed to be protected activity the suspension would have been the same. The objection to Jarvis by the clients were chiefly about Mary and Tim Jarvis being on the same project, the so-called conflict-of-interest problem. TR 359-360. Dr. Shipp expressly stated that this "does not seem to be an issue. I believe we have worked through this." CX 16. Jarvis's managers at Battelle, Heaberlin and Gajewski, thought the substance of Jarvis's work on this project was very good. CX 2.

Jarvis cites a case decided by a hearing officer in the Department of Energy under 10 CFR §708.5(a)(1)(ii). That section provides that a DOE contractor may not discriminate against an employee because the employee has disclosed information that the employee believes in good faith to evidence "a substantial and specific danger to employees or public health or safety." Nothing in the RAC was believed by Jarvis to evidence such danger in existing procedures. On the contrary, the RAC seems to be less conservative than existing procedures regarding public health or safety.

Conclusion

I conclude that the people at Battelle who made the decision to suspend Jarvis were not aware of the protected activity Jarvis engaged in until 1991. Further, the evidence is insufficient to raise the inference that the protected activity played any part in the suspension. Even if the RAC activity in 1995 is considered a protected activity, I conclude that the events of April 19-22, 1996 were the overwhelming reason for the suspension, which would have been imposed regardless of the RAC activity, and regardless of the references to complainant's style in his personnel records. I recommend that the complaint be dismissed.